limitation being extended and beginning to run from the 6th October, 1948.

In these circumstances there will be judgment for the plaintiff as prayed.

Judgment for the plaintiff

REX v. LEE KAY LENG.

[App. Crim. Juris. (Spenser Wilkinson, J.) February 29, 1952]

[Penang — Criminal Appeal No. 2 of 1952]

Gaming — Private lottery — Tickets found in possession of non-member — Common Gaming Houses Ordinance, s. 9.

The respondent was found to have in his possession 23 tickets in a Selangor Turf Club lottery; he was not a member of the Club. The lottery was a private one, strictly limited to members of the Club. The respondent was charged with assisting in carrying on a public lottery but was acquitted at the close of the case for the prosecution. The Crown appealed.

Held, that there was no evidence that the respondent had acquired any interest in the tickets or their possible proceeds, either by purchase or as a gift; hence no question arose of there being any subsidiary lottery in progress.

Held further, that the presumption raised under section 9 of the Common Gaming House Ordinance was sufficiently rebutted by specific evidence that the tickets were in a private lottery.

Cases referred to:—

(1) *Kader Batcha v. Public Prosecutor* (1935) M.L.J. 251; (1935) F.M.S.L.R. 18 (C.A.).

(2) *Sahib bin Ali v. Rex* (1939) M.L.J. 281; (1939) S.S.L.R. 212 (C.C.A.).

CRIMINAL APPEAL.

C. M. Sheridan (Federal Counsel) for the Crown.

Lim Kheng Kooi for the respondent.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — The respondent was charged in the Magistrate's Court that on the 29th August, 1951 he was found to be assisting in carrying on a public lottery, an offence under section 4(c) of the Common Gaming Houses Ordinance, or alternatively, that on the same date he was found to have purchased lottery tickets contrary to section 7(1) of the same Ordinance.

At the close of the case for the prosecution in the Magistrate's Court the accused was acquitted on both the main charge and the alternative charge. Against these acquittals the Crown appealed, but the offence charged in the alternative charge being one punishable with a fine only not exceeding $25, there can be no appeal against the acquittal on this charge and my judgment therefore is based upon the respondent having been found not guilty of having purchased lottery tickets.

As far as the appeal regarding the main charge is concerned, the principal evidence was the fact that twenty-three tickets in a Selangor Turf Club Sweepstake were found in the respondent's possession. Evidence was also adduced to show that these particular tickets had been sold by the Club to various members; that the respondent was not a member of the Turf Club concerned; and that the Sweepstake in question was a private lottery, strictly limited to members of the Selangor Turf Club.

The Crown relied upon two decided cases and upon the presumption contained in section 9 of the Common Gaming Houses Ordinance. I will deal first with the arguments based upon the decided cases.

The leading case on this subject is *Kader Batcha v. Public Prosecutor*[1]. In that case the majority of the Court held that the selling of Perak Turf Club Sweep tickets to non-members of the Turf Club did not constitute the whole Sweep a public lottery, but that a member might use such tickets for the purpose of promoting or organising a separate and distinct lottery of his own and that if this were done then the subsidiary lottery was deemed to be a public lottery until the contrary was proved. The principle of this decision was followed by the Court of Appeal of the Straits Settlements in the case of *Sahib bin Ali v. Rex*[2]. It is to be observed that in each of these cases the person prosecuted was the Turf Club member who had passed on either tickets or shares in a ticket to a non-member. I can find no decided case which deals with the position of a non-member to whom Sweep tickets or shares in a Sweep ticket are sold or given.

The following passages from the judgments in these two cases appear to me to be of importance. The first passage is from the judgment of Sir Samuel Thomas, C.J. (*Kader Batcha's Case*[1]) and reads as follows:—

"The moment, therefore, that a person sells a ticket to a member of the ordinary public, i.e. to a person who

is not a member of the Perak Turf Club he has abandoned any shelter of non-publicity which the original sweepstake may afford, and has engaged in a lottery of a different character. Then the duty is cast upon him of proving that that varied lottery (not the original sweepstakes) is not a public lottery."

In giving judgment in *Sahib bin Ali's*[2] case McElwaine, C.J. must have had the above passage in mind when he used the following words :—

"Once any person who is not a member of the Club acquires an interest in a lottery ticket, the lottery so far as that person is concerned becomes a sub-lottery and a public lottery."

It will be observed that this dictum of McElwaine, C.J. is the converse of the dictum of Sir Samuel Thomas, C.J. The latter refers throughout to the seller, whereas the former takes the matter further and states that the purchaser is the person concerned in the sub-lottery. In so far as the learned Chief Justice has adopted the converse of the earlier case his dictum appears to me to be *obiter*, because the appellant in that case was a member of the Turf Club who passed on shares in various tickets to a non-member of the Club; the non-member who received the share was not before the Court. Nevertheless, the dictum is one that I feel I ought to follow, if it applies to the case now before me. It seems to me, however, that the important part of that dictum is contained in the words "acquires an interest in" just as the important words in the passage quoted from the judgment of Sir Samuel Thomas C.J. are "a person (i.e. the member) sells a ticket". It seems to me that before anybody can be said to be taking part in a lottery there must be some evidence that he has acquired some interest in the tickets, or their possible proceeds, either by purchase or as a gift.

There was no evidence in the present case as to how the respondent came to have the tickets which were found in his possession or upon what terms or for what purpose he held them. He might, as was suggested on behalf of the respondent in this case, have been holding them for safe custody or he might have been holding these tickets, which had been bought by various members, to hand over to whichever of those members happened to be in Kuala Lumpur at the time when the Sweep was drawn. It must be assumed, as I have already indicated, that he did not buy them. On the whole I have come to the conclusion that in this case the prosecution did not prove, what was clearly proved in the other two cases, that some kind of subsidiary lottery was in progress. Without the presumption, therefore, there was insufficient evidence to convict.

The next question is whether the presumption raised by section 9 of the Ordinance covers the present case. That section reads :—

"9. A person selling, offering for sale, giving, delivering or collecting lottery tickets or found in possession of ten or more lottery tickets or of any account, memorandum or record of stakes or wages in or relating to a lottery shall be presumed until the contrary is proved to be assisting in a public lottery then in progress."

It was argued on behalf of the respondent that as the definition of "lottery ticket" in section 2 refers only to papers, writings etc. connected with a public lottery, the expression "lottery tickets" in section 9 must also be limited to tickets in a public lottery. In view of the fact, however, that section 2 uses the word "includes" in its interpretation of "lottery ticket" I think anything which, on the face of it, is in ordinary language a lottery ticket is hit by section 9, and this argument, therefore, fails.

The next argument put forward on behalf of the respondent is that the presumption having been raised by the possession of more than ten lottery tickets by the respondent the presumption was rebutted by evidence obtained from the prosecution witnesses, namely the specific evidence that those tickets were tickets in a private lottery.

The point is by no means an easy one, but I have come to the conclusion that the question whether or not a statutory presumption of this kind has been rebutted by the evidence is a question of fact. The respondent, having obtained from the prosecution witnesses, as he was entitled to do, evidence in rebuttal of the presumption, the matter was, I think, left in sufficient doubt to entitle the Magistrate to come to the conclusion that there was not sufficient evidence to justify his calling upon the defence. I do not think, therefore, that I ought to interfere with the respondent's acquittal.

I desire to leave open the question whether the more possession of tickets which on the face of them indicate that they are tickets in a private lottery would be sufficient to raise the presumption under section 9 and leave it unrebutted. My decision in this appeal is based solely upon the facts of this particular case.

I also desire to draw attention to the fact that evidence was admitted of what one Teh Ah Bah said to the Police in his statement. This evidence should not have been admitted. Section 124 of the Criminal Procedure Code applies to all evidence of this kind whether tendered by the prosecution or by the defence and whether elicited in examination-in-chief or in cross-examination. The evidence thus improperly admitted does not affect my view as to what I should do in this particular case, but I would point out that the result of Counsel for the defence eliciting inadmissible evidence in cross-examination might well have been, in other circumstances, to compel me to order a fresh trial.

For the reasons I have given the appeal is dismissed.

Appeal dismissed.

CHIN KHING SIONG v. REX.

[App. Crim. Juris. (Spenser Wilkinson, J.) March 7, 1952]

[Penang — Criminal Appeal No. 7 of 1952]

Criminal trial — Complainant's evidence the only evidence against accused — Failure to produce complainant's report to the police at hearing of trial — Fatal — Not an irregularity under s. 448 of the Criminal Procedure Code—Evidence Ordinance, s. 114 illustration (g).

Where the evidence of the complainant is the only evidence against the accused, the failure to produce at the trial the complainant's report to the police raises a presumption that it would, if produced, have been unfavourable to the prosecution's case. Such an omission is not an irregularity that can be cured under section 448 of the Criminal Procedure Code.

Case referred to:—

(1) *Rex v. Cohen* 2 Cr. App. R. 207.

CRIMINAL APPEAL.

Khoo Eng Cheang for the appellant.

C. M. Sheridan (Federal Counsel) for the Crown.

The facts and arguments appear sufficiently from the judgment.

Spenser Wilkinson, J. : — This was an appeal from the decision of the Juvenile Court at Bukit Mertajam. The appellant was charged that on the 18th December, 1951 at about 9 a.m. he committed criminal trespass by entering the compound of house No. 622, Mukim 17, Pagar Tras, Machang Buboh with intent to commit theft.

Although the charge mentions 9 a.m. as the time of the alleged offence from the evidence it is clear that 9 p.m. was meant.

The complainant's story was that having heard his dog's bark he got up and looked out of his window and saw someone striking a match near his fowl house ten yards away. He then opened the door and went out and saw a male Chinese. The complainant shouted "thief!" and the male Chinese ran away. The complainant chased him for thirty yards. As he ran he found a bicycle on a small path and upon his finding the bicycle the person whom he was chasing turned back and claimed the bicycle. The male Chinese proved to be the appellant, who claimed the bicycle as his. Nevertheless, the complainant retained the bicycle (which, of course, he had no right to do) until the next morning, when he reported to the Police.

Apart from formal evidence of arrest, the evidence of the complainant was the only evidence against the appellant.

There were various grounds of appeal, but the main points which emerged from the arguments before me were whether there was sufficient evidence of intent to steal and whether there was sufficient evidence of actual trespass.

As regards the intent to steal, I was of opinion that the circumstances of the boy being seen striking a match in darkness near a fowl house and then running away when disturbed was sufficient evidence, if believed, upon which the Court could have inferred intention to steal. On the other hand the action of the appellant in returning and claiming his bicycle seems consistent with his running away having been due as much to innocent fear as to guilty intention. This point is not mentioned by the learned President in his grounds of decision.

As regards the actual trespass, the evidence is to my mind most unsatisfactory. In examination-in-chief the complainant did not state where the bicycle was found, though the inference from the way he told the story appears to me to be that it was at least thirty yards from the house. In cross-examination the complainant said: "You entered my compound", and in reply to the Court he said: "The bicycle was on a small path in my compound". No evidence was given as to what he meant by the expression "my compound", nor as to its extent, nor how it lay in relation to the public road or foot-path. The complainant may well have looked upon some of the land near his house as his compound, although he may not have been in legal possession of it.